MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA **v.** **ABD AL HADI AL-IRAQI**	**AE 136O** **RULING** Defense Motion to Compel Discovery Regarding CIA Rendition, Detention, and Interrogation Program **5 November 2019**

1. **Procedural History**.

a. In AE 136,[1] the Defense requested "the Commission compel production of documents and information relating to the arrest, detention, rendition, and interrogation of [the Accused] prior to his May 2007 transfer to Naval Station Guantanamo Bay." In the motion, the Defense referenced and argued the applicability of the "ten identified categories of information regarding the Central Intelligence Agency Rendition, Detention, and Interrogation (CIA RDI) Program" ordered produced by the Military Commission in *United States v. al Nashiri*.[2]

b. In AE 136A, the Prosecution responded, "[t]he Government has previously searched for, reviewed, and produced all discoverable information relating to the Accused while in CIA custody." The Government argued that this Commission should deny the requested relief, suggesting that "there is no additional, unproduced material responsive to the Defense's

[1] AE 136, Defense Motion to Compel Discovery Regarding CIA Rendition, Detention, and Interrogation Program, filed 13 February 2019.
[2] *See United States v. Abd al Rahim Hussayn Muhammad al Nashiri,* AE 120C, Order, Defense Motion to Compel Discovery of Information in the Possession of Any Foreign Government and the United States Related to the Arrest, Detention, Rendition and Interrogation of the Accused, dated 14 April 2014 and AE 120AA, Order, Government Motion to Reconsider AE 120C In Part so the Commission May Take Into Account Declassification Efforts Underway at Prior Prosecution Request. Clarify the Discovery Standard the Commission is Applying, and Safeguard National Security While Ensuring a Fair Trial, dated 24 June 2014.

motion."[3] The Government further noted that, even if the *al Nashiri* discovery order was applied in this case, the Defense would still be entitled to nothing more than what the Government has previously produced.

c. In their reply in AE 136E,[4] the Defense again requested that this Commission "order production of documents consistent with those ordered in *United States v. al Nashiri*" and identified documents in other filings as being responsive to this discovery issue, specifically AE 135C,[5] Attachments B and C, and a document listed in footnote 2 of Attachment D to AE 140.[6]

d. The Defense subsequently filed AE 136F,[7] a supplement to their original motion. In it, the Defense again suggested that the Government has specific documents and records pertaining to the Accused's treatment while he was in the custody of the CIA that have not been provided in discovery. The Defense further argued the discoverability of the documents underlying the Military Commission Rule of Evidence (M.C.R.E.) 505 substitutions that were approved by this Military Commission. Finally, the Defense requested documents related to cooperation between agencies such as the CIA and FBI related to the RDI program.

e. Later, the Defense filed AE 136I,[8] another supplement to their initial motion to compel discovery, in which they again argued for the production of communications between the FBI and CIA regarding detention, treatment, and interrogation of the Accused.

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[3] AE 136A, Government Response to Defense Motion to Compel Discovery Regarding CIA Rendition, Detention, and Interrogation Program, filed 21 February 2019.
[4] AE 136E, Defense Reply to AE 136A Government Response to Defense Motion to Compel Discovery Regarding CIA Rendition, Detention, and Interrogation Program, filed 6 March 2019.
[5] 135C, Defense Reply to Government Response to Defense Motion to Compel Discovery Related to White House and DOJ Consideration of the CIA Rendition, Detention and Interrogation Program, filed 28 February 2019.
[6] AE 140, Defense Motion to Compel the Full Unredacted Version of the "Memorandum of Agreement Between The Department of Defense (DOD) And The Central Intelligence Agency (CIA) Concerning The Detention by DOD Of Certain Terrorist At A Facility At Guantanamo Bay Naval Station" That Was Approved For Release On 6 October 2016, filed 14 February 2019.
[7] AE 136F, Defense Supplement to AE 136, Defense Motion to Compel Discovery Regarding CIA Rendition, Detention, and Interrogation Program, filed 13 May 2019.
[8] AE 136I, Defense Supplement to AE 136, AE 136E, AE 136F, filed 15 July 2019.

f. The Prosecution filed AE 136K[9] in response to the two Defense supplemental filings, arguing the Defense is attempting to pierce the M.C.R.E. 505 classified discovery process. The Government reiterated that it had conducted a thorough review of all available information related to the Accused's detention by the CIA and had produced all discoverable information. Finally, the Defense filed a reply brief, AE 136N.[10] The Commission heard unclassified oral argument on 26 August 2019.[11]

2. **Law**.

a. The Government must produce information that is "material to the preparation of the Defense" when the information is "within the possession, custody, or control of the Government, the existence of which is known or by the exercise of due diligence may become known to the trial counsel" as set forth in Rule for Military Commission (R.M.C.) 701(c)(1)–(3). The Government must also disclose evidence that is exculpatory as set forth in R.M.C. 701(e) and explained in *Brady v. Maryland*, 373 U.S. 83, 88 (1963). The materiality standard is not normally a heavy burden. Evidence is material if there is a strong indication the information will "play an important role in uncovering admissible evidence, aiding witness preparation, corroborating testimony, or assisting impeachment or rebuttal." *United States v. Lloyd*, 992 F.2d 348, 351 (D.C. Cir. 1993). Information is also discoverable if it would tend to reduce the sentence. R.M.C. 701(e)(3).

[9] AE 136K, Government Response to Defense Supplement to AE 136, AE 136E, AE 136F, filed 29 July 2019.
[10] AE 136N, Defense Reply to AE 136K, Government Response to Defense Supplement to AE 136, AE 136E, and AE 136F, filed 12 August 2019.
[11] *See* Unofficial/Unauthenticated Transcript of the *U.S. v. Abd al Hadi al-Iraqi* Motions Hearing, dated 26 August 2019, pp. 3353–3375.

b. With respect to Defense access to potential witnesses, R.M.C. 701(j) provides, "[e]ach party shall have adequate opportunity to prepare its case and no party may unreasonably impede the access of another party to a witness or evidence."

c. The Court of Appeals for the District of Columbia Circuit has held "that classified information is not discoverable on a mere showing of theoretical relevance in the face of the government's classified information privilege, but that the threshold for discovery . . . further requires that a defendant seeking classified information . . . is entitled only to information that is at least helpful to the defense of the accused." *United States v. Yunis*, 867 F.2d 617, 623 (D.C. Cir. 1989) (citing *Roviaro v. United States*, 353 U.S. 53 (1957)).

d. The Government has the responsibility to determine what information it must disclose in discovery. R.M.C. 701(b)–(c); *United States v. Briggs*, 48 M.J. 143 (C.A.A.F. 1998); *Pennsylvania v. Ritchie*, 480 U.S. 39, 59 (1987). "Unless defense counsel becomes aware that other exculpatory evidence was withheld and brings it to the court's attention, the prosecutor's decision on disclosure is final. Defense counsel has no constitutional right to conduct his own search of the State's files to argue relevance." *Ritchie*, 480 U.S. at 59. It is incumbent upon the Government to execute this duty faithfully, because the consequences are dire if it fails to do so. *See United States v. Stellato*, 74 M.J. 473 (C.A.A.F. 2015) (finding no abuse of discretion in the military judge's dismissal with prejudice of charges due to a prosecution discovery violation); *United States v. Bowser*, 73 M.J. 889 (A.F. Ct. Crim. App. 2014), *summarily aff'd* 74 M.J. 326 (C.A.A.F. 2015).

3. **Conclusions of Law**.

a. AE 136 is not the first motion filed by the Defense seeking discovery of information concerning the CIA Rendition Detention and Interrogation Program.[12] The Defense proffers several reasons for the discoverability of the requested materials: first, to the extent the requested information is about the Accused's role in the charged offenses, they are material to the preparation of the defense; second, the records may reveal government wrongdoing, expose defective or tainted evidence, or weigh on the admissibility and credibility of statements by the Accused or other detainee witnesses, as well as the admissibility of other evidence derived from any coerced statements; third, the requested information is likely to lead to the discovery of admissible mitigation evidence; finally, the Defense contends the information could form the basis of a motion dealing with illegal pretrial punishment or outrageous government conduct. Additionally, the Defense argues the Commission should, in essence, adopt the discovery order applied in *United States v. al Nashiri*.

b. The Commission finds that under R.M.C. 701, *Brady*, and *Yunis*, and, as this Commission previously held in AE 135G,[13] any evidence pertaining to the Accused's treatment and interrogation while in the custody of the CIA is generally relevant and material to the preparation of the Defense in this case. Further, any evidence which relates to the credibility or voluntariness of statements obtained from the Accused (or witnesses against him) is relevant and material for the purposes of motions practice and for both the findings and potentially any pre-sentencing phase of trial.

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[12] *See, e.g.*, AE 135.
[13] AE 135G, Ruling, Defense Motion to Compel Discovery Related to White House and DOJ Consideration of the CIA Rendition, Detention, and Interrogation Program, dated 14 June 2019.

c. The Commission declines the Defense invitation to adopt the AE 120AA discovery order from *United States v. al Nashiri* as the facts and litigation at issue in this Commission are different from the litigation in that military commission. However, this Commission concurs that several of the categories of information outlined by the Defense in AE 136F are relevant and material to the preparation of the Defense and should be produced in discovery, if the Government has not already done so, subject to the application of M.C.R.E. 505.

Records Pertaining to the Accused

d. In AE 136F, the Defense cites several specific forms of potential evidence that were apparently created during the Accused's detention by the CIA, claiming that the materials in question have not been turned over in discovery. The Commission agrees that the specific types of materials mentioned by the Defense on page 9 of AE 136F are examples of the types of materials that are discoverable in this case. Therefore, the specific materials referenced by the Defense shall be located, reviewed and, if appropriate, turned over in discovery to the Defense, subject to M.C.R.E. 505, if the Government has not already done so. If the specific materials referenced in AE 136F have previously been turned over to the Defense, if they are unavailable for some reason, or if the Government has determined that the specific materials are not discoverable for any reason, the Government will so indicate in a notice pleading to the Defense and this Commission not later than 30 days from the date of this ruling. If the subject materials previously existed but are now unavailable, the Government shall further indicate the circumstances leading to the unavailability.

e. Similarly, other documents, photos, reports, psychological assessments, medical records, or similar types of documentation of the Accused's treatment, interrogation, health status, and conditions of detention during the period in which he was in the custody of the CIA

are material to the preparation of the Defense and shall be produced by the Government in discovery, subject to the provisions of M.C.R.E. 505, if the Government has not already done so.

Potential Witness Identification

f. In AE 136F, the Defense expanded the scope of its initial motion to compel discovery to include "documents and information identifying and relating to the individuals who interacted with [the Accused] at the black site."[14] The Defense points to the fact that similar information was deemed discoverable in *United States v. Al Nashiri* and argues that the identities of potential witnesses are "critical to [the Accused's] ability to prepare a defense." The Government, in their response to the Defense's supplemental pleadings, did not specifically address this aspect of the Defense motion to compel discovery. This Commission finds that the existence of and identities of potential witnesses who possess information that would be material to the preparation of the Defense, including medical personnel (examining and treating physicians, psychologists, psychiatrists, mental health professionals, dentists, etc.), guard force personnel, and interrogators, whether employees of the United States Government or employees of a contractor hired by the United States Government, who had direct and substantial contact with the Accused while the Accused was held in custody at the so-called "black site," are generally discoverable pursuant to R.M.C. 701(j).[15] The Government is expected, in accordance with this Commission's ruling in AE 029B[16] to work with the Defense to facilitate interviews of potential witnesses who

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[14] AE 136F at 20.

[15] This should not be interpreted as requiring the Prosecution to violate the Intelligence Identities Protection Act, 50 U.S.C. § 3121. Additionally, M.C.R.E. 505 may apply where the identities of potential witnesses are deemed classified. Personally Identifiable Information of potential witnesses may be substituted with a pseudonym consistent with the procedures of M.C.R.E. 505. Any disputes between the parties related to the discovery of the identities of specific potential witnesses will be resolved by this Commission upon the submission of appropriate pleadings by the parties.

[16] Based on this Commission's ruling in AE 158R, and the subsequent Defense request in AE 158U, this Commission will reconsider the ruling in AE 029B. Until that reconsideration process has been concluded, the parties will continue to comply with AE 029B.

have material information regarding the Accused's treatment and conditions of confinement while in CIA custody.

Evidence of Coordination between the CIA and the FBI

g. In AE 136E, AE 136F, and again in AE 136I, the Defense continued to expand the scope of their original motion to compel discovery to include requests for discovery of a [redacted] communications between the CIA and the FBI. The [redacted] The Defense claims the United States has turned over such evidence in discovery in other military commission cases, but not in this case.

h. In their response, the Government does not specifically address whether or not the Government deems communications between the FBI and the CIA to be material to the preparation of the Defense. Instead, the Government essentially repeats their position that the Government has "produced all discoverable information relating to the Accused while in CIA custody." But the Government doesn't indicate whether they've actually reviewed any communications between the CIA and FBI in search of information which may be material to the preparation of the Defense. The Government's assertion they have turned over "all discoverable information" is of minimal assistance to this Commission when it is unclear whether the Government deems the type of information requested by the Defense to be discoverable in the first place.

i. The Government has made clear its intent to refrain from offering into evidence at trial statements made by the Accused while in CIA custody, presumably because the Government

believes those statements would be inadmissible pursuant to M.C.R.E. 304. Instead, the Government intends to offer into evidence incriminating statements made by the Accused to FBI "clean teams" after the Accused was transferred from CIA custody to the custody of the Department of Defense at Naval Station Guantanamo Bay. Therefore, at issue in this case will be whether the Accused's statements to the FBI "clean team" were voluntarily given when considering the totality of the circumstances in accordance with M.C.R.E. 304(a)(2). That analysis may require the consideration of any cooperative efforts between the so-called FBI "clean team" and the CIA that may have occurred. Therefore, at least some discovery on this issue is warranted.

j. In AE 136E, the Defense suggests that [redacted] is material to the preparation of the Defense. The Commission agrees that the document in question may be material to the preparation of the Defense. The Government is directed to: (1) produce to the Defense copies [redacted] any other written agreements between the FBI and the CIA that specifically govern or establish cooperation between the two agencies with respect to the interrogation of military commission detainees, subject to the provisions of M.C.R.E. 505 as appropriate; or (2) submit the documents in question for *in camera* review if the Government contends that the documents in question do not contain the types of relevant and material information ordered produced by this Commission.

k. In light of the Government's intent to offer into evidence statements made by the Accused to FBI "clean teams," the Commission finds that communications and coordination between the FBI and CIA specifically related to the interrogation of the Accused during the period of time the Accused was in custody are material to the preparation of the Defense.

Responsive communications, including emails, cables, and other written coordination between CIA and FBI officials regarding the Accused's interrogation, including discussions of interview tactics, suggested interview questions, and the sharing of information obtained during CIA interrogations of the Accused, may be important in evaluating the totality of the circumstances surrounding the "clean team" interviews. Therefore, the Government is directed to obtain, review, and produce in discovery, subject to M.C.R.E. 505, such communications specific to the Accused's interrogations, if the Government has not already done so.

Documents Underlying M.C.R.E. 505 Summaries and Substitutions

l. In AE 136F, the Defense also suggests the Accused is "entitled to the documents underlying the 505 substitutions that have already been produced."[17] The Defense contends this is not a motion for reconsideration of this Commission's rulings with respect to the M.C.R.E. 505 substitutions and summaries, which would be prohibited by M.C.R.E. 505(f)(3). This Commission has previously approved summaries and substitutions in the AE 023 series, specifically finding the proposed summaries and substitutions would provide the Defense "substantially the same ability to make a defense as would discovery of or access to the specific information" as required by M.C.R.E. 505(f)(2)(C). While the Commission's rulings and orders contained in the AE 023 series currently stand, in light of this Commission's ruling in AE 158R and the Defense request in AE 158U, this Commission will be reconsidering the rulings and orders in the AE 023 series issued by Judge Waits. For that reason, the Commission will defer final ruling on the discovery of documents underlying the substitutions and summaries approved by Judge Waits until the completion of the reconsideration process.

[17] AE 136F at 26.

m. With respect to the substitutions and summaries approved by Judge Rubin, this Commission finds the Defense request to be a veiled request for reconsideration, which is barred by M.C.R.E. 505(f)(3). Therefore the Commission finds no basis to grant the Defense request for a release of the documents underlying summaries and substitutions approved by Judge Rubin.

4. **Ruling**. The Defense motion is **GRANTED in part** and **DENIED in part** as set forth herein.[18]

So **ORDERED** this 5th day of November, 2019.

//s//
M. D. LIBRETTO
LtCol, USMC
Military Judge

[18] The Government has asserted it has "searched for, reviewed, and produced all discoverable information relating to the Accused while in CIA custody." Other than the specific orders for discovery set forth in this ruling and absent any further showing by the Defense that the Prosecution has failed to provide or has withheld specific responsive information, the Commission will not inspect the Prosecution case file in camera nor will it direct the Prosecution to open their case file for inspection by the Defense. The Commission expects the Government to comply with its discovery obligations and the Commission will not place itself in the position of double checking the Government's work in that regard absent a showing by the Defense that the Government has failed to provide discovery of specific information that is material to the preparation of the Defense.